IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 4847 of 1996
To
SPECIAL CIVIL APPLICATION No. 4848 of 1996

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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JAYRAM DEVJI KHIMJI BHANUSHALI - Petitioner(s)
Versus
COLLECTOR & 1 - Respondent(s)

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Appearance :
MR BHARAT JANI for Petitioner(s) : 1,
RULE SERVED BY DS for Respondent(s) : 1 - 2.

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 01/03/2007

ORAL JUDGMENT

1. As in both the matters common question arises for consideration they are being considered by this common order.

2. The short facts of the case are that both the petitioners applied to the Deputy Collector for allotment of the land of Government Tower No.173 and the application was made for the land admeasuring one acre and 30 gunthas on the ground that the Government waste land is situated adjacent to the land belonging to the concerned petitioner's land bearing Survey No.22/1 and 22/2. It appears that the Mamlatdar gave opinion recommending in favour of the petitioners and ultimately on 14.11.1994 an order was passed by the Deputy Collector for allotment of the land to the petitioners. The petitioners had paid the amount and thereafter, the formal order of allotment was also passed. As per the petitioners after taking over the possession of the land, they constructed pucca compound wall over the land and made further huge investment of about Rs.80,000/-. It appears that on 22.06.1995, the District Collector issued a show-cause notice for suo-motu exercise of the power under Section 211 of the Bombay Land Revenue Code (hereinafter referred to as the 'Code') for taking up the

matter in Revision against the order passed by the Deputy Collector for allotment of land to both the petitioners. The petitioners submitted reply and ultimately the District Collector passed the order on 04.10.1995 whereby the order of the Deputy Collector for allotment of land is cancelled and the Mamlatdar is directed to take back possession and the petitioners are also directed to get the refund of the amount paid by them. It appears that the petitioners further carried the matter in Revision before the State Government and the said Revisions vide order dated 12.06.1996 are dismissed and it is under these circumstances, the present petitions.

3. Heard Mr.Jani, learned advocate for the petitioner and Mr.Satyam Chhaya, learned A.G.P. for the State authorities.

4. Mr.Jani, learned advocate for the petitioners contended that the Collector, while exercising the power under Section 211 of the Code, has found that the allotment is also in breach of the

provisions of Section 8 of the Bombay Prevention of Fragmentation Act (hereinafter referred to as the 'Fragmentation Act') and he submitted that in view of the decision of this Court in case of **Evergreen Apartment Co-op. Housing Society V/s. Special Secretary, Revenue Department, Gujarat State** reported in **1991(1) GLR 113,** the Revenue Officer exercising power, under the Bombay Land Revenue Code, has no power to take decision under the other enactment and, therefore, he submitted that there is jurisdictional error committed by the respondent authority.

5. The contention appears to be attractive but upon the close scrutiny, it appears that the matter is not decided by the Collector on the ground that there is a breach of the provisions of Fragmentation Act but the Collector has also examined as to whether the allotment was justified and as to whether the land alloted is adjacent to the land of the concerned petitioners. The perusal of the order passed by the Collector shows that the local inspection was

taken on 29.09.1995 and it was found that between the land of the petitioners and the land which is allotted to the petitioners, there was a water course and, therefore, it is found by him that the land cannot be said as adjacent to the land of the petitioners, covered by the policy of the Government for allotment. The Collector has also found that as per the prevailing policy of the Government, the adjoining land can be allotted if it does not exceed two acres and with a view to see that such allotment does not exceed two acres, one acre 30 gunthas has been allotted to each of the petitioners who are father and son. While examining the matter, the Collector has observed that there is also breach of the provisions of Section 8 of the Fragmentation Act by making division of the land. If on merits for allotment of the land, the Collector found that the Deputy Collector has not properly exercised the power and the allotment is illegal, and if additional ground is mentioned that there is also breach of the provisions of the Fragmentation Act, it cannot be said that the Collector has

exceeded in exercise of the jurisdiction and the reason being that the allotment of the land in favour of the petitioners was by the Deputy Collector in exercise of the power under the Code. It was not a case where the land was alloted under the Fragmentation Act and while exercising the jurisdiction under the Code, the conclusion is recorded under the Fragmentation Act. Further, the decision of this Court in Evergreen Apartment Co-operative Housing Society (Supra) is subsequently considered by this Court in case of **Jayantilal Jethalal Soni V/s. State of Gujarat and others** reported in **2005(4)GLR 3354** and this Court *prima facie* observed that, it would not be proper to hold that even if the breach is under other enactment or such transfer is barred under the other enactment, the Revenue authority exercising the power under the Code, could have ignored the same for the purpose of recording of the mutation. And ultimately, so far as the revenue entries under the Code are concerned, the view taken by this Court is that the revenue entry may be allowed to continue in

the revenue record with the clarification that the transaction *prima facie* in breach of the other enactment of the entry shall be subject to final decision which may be taken by the competent authority under the other enactment.

6. Mr.Bharat Jani, learned counsel appearing for the petitioners submitted that this Court may adopt the same course of action by making the reference to the competent authority under the Fragmentation Act and in his submission, the competent authority would be the State Government under Section 35 of the Fragmentation Act and till then the allotment already made may not be disturbed.

I am afraid such contention can be accepted in view of the order passed by the Collector under Section 211 of the Act. As observed earlier, the exercise of the power by the Deputy Collector was not under the Fragmentation Act but was under the Bombay Land Revenue Code. The Collector in exercise of the revisional

jurisdiction under the Code has exercised the power and ultimately found the allotment as not proper. Mere observations to the effect that there is also breach of the provisions of the Fragmentation Act, would not render the order passed by the Collector without jurisdiction since on other aspects, the order passed by the Collector cannot be said as illegal or by exercise of the discretion in a perverse manner. Under the circumstances, the contention as sought to be canvassed on behalf of the petitioners that there is a jurisdictional error committed by the lower authority while exercising the power cannot be accepted. Hence, rejected.

7. On the other aspect of the order passed by the Collector and its confirmation thereof by the State Government, it appears that both the lower authorities have found the allotment as not proper and have found that the basic requirements of the adjacent land were not satisfied since the water course was passing between the land of the petitioners concerned and the Government waste

land. If the lower authorities upon the factual inquiry including that by local inspection has found that the land was not an adjacent land and it exceeded the limit prescribed for allotment of the land of two acres and, therefore, if the allotment made is not proper, such exercise of the power cannot be said as by committing any jurisdictional error or exercising the discretion in a perverse manner which may be interfered by this Court under Article 227 of the Constitution of India.

8. Mr.Jani, learned counsel for the petitioner submitted that exercise of the suo motu power was barred by delay and he, therefore, submitted that the revisional authority could not have exercised the suo motu power. If the matter is examined in that line, it appears that the petitioner made an application for allotment of the land on 21.04.1994, the report of Mamlatdar was on 20.10.1994, the allotment order was passed on 14.11.1994 and the show-cause notice has been issued on 22.06.1995. If within period of about

seven months, mere construction of a compound wall was made or by making the land as cultivable within a period of six to seven months or if the cultivation is made as stated, cannot be said to be such a situation where, it can be said that there was unreasonable delay which would bar the jurisdiction of the higher forum to take up the matter in Revision, more particularly when on the aspects for compensating to the extent of investment made, the observations deserve to made and the direction deserves to be issued as stated hereinafter.

9. The last contention raised by Mr.Jani on the aspects of the exercise of the power by the Collector when the petitioner had already invested the amount of Rs.80,000/- deserves consideration. So far as the refund of the amount already paid is concerned, the District Collector has observed for the liberty to the petitioner. However, though it was contended in the reply to the show-cause notice and it also came on record that the boundary wall was already constructed by

the petitioner, neither in the order of the Collector nor in the order of the State Government, there is any reference for refunding of the amount or the investment made by the petitioner by altering its position in the matter of exercise of the power under the revisional jurisdiction. Even if such powers are read with the higher authority, and consequently, the allotment is to be cancelled, if the allottee has altered his position acting under the *bona fide* belief that the allotment is lawful and has made any investment or otherwise, the said aspect is simultineously required to be considered by the revenue authority while cancelling the allotment. It does appear from the record that it was contended by the petitioner that the investment of about Rs.80,000/- was made for developing the land so as to make it agricultural land and even the construction of the compound wall also referred to, at the time when the local inspection was made, by stating that the compound wall was found. Therefore, in these circumstances, it was required for the Collector

to make an inquiry to the extent of refund of all the amounts to the petitioner so far as it relates to the lawful investment in addition to the price/consideration paid by the petitioner. As no inquiry is made by any of the authorities, neither by the Collector nor by the State Government, the appropriate directions deserve to be issued. However, such will be the principle prevailing qua the petitioner also for making good the benefit derived by him pursuant to an order of the Deputy Collector which is found as illegal by the Collector as well as by the State Government on the aspects of allotment made. Therefore, while undertaking such inquiry, the petitioner will also be required to return the benefit accrued to him by cultivating the land minus the expenses incurred for cultivation, I find it proper not to further conclude on the said aspect since the inquiry will have to be undertaken by the Collector but suffice it to say that the aspects of refund and compensating for the expenses incurred by the petitioner minus the benefit already derived by the petitioner were

also required to be considered by holding inquiry and appropriate orders were required to be pased.

10. In the result, the impugned order passed by the Collector and its confirmation thereof by the State Government, so far as it relates to the cancellation of the allotment made and the refund of the amount paid are maintained. However, it is directed that the Collector shall, within a period of six months from the receipt of the order of this Court, hold an inquiry about the investment made by the petitioner on the date when the order came to be passed and shall also examine the matter for the benefit derived by the petitioner in light of the observations made hereinabove and shall pass consequential order for payment of the said amount in accordance with law.

11. Petition is partly allowed to the aforesaid extent. Considering the facts and circumstances of the case, there shall be no order as to costs. Rule is partly made absolute.

12. Mr.Jani, learned counsel for the petitioner prays that the operation of this order be stayed for some time so as to enable the petitioner to approach before the higher forum. Considering the facts and circumstances, for a period of four weeks, status quo as prevailing on today of the land in question shall be maintained.

(JAYANT PATEL, J.)

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